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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 940

SUSAN E. O. BREAKEFIELD, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JURISDICTION

This Court has jurisdiction under 66 Stat. 544, ch. 649, section 3(b), D.C. Code, Sec. 47-2404(a), rather than under 28 U.S.C., sections 1254(1) and 2102(c) as relied upon by petitioner.

QUESTION PRESENTED

In the view of respondent, the question presented is: Where the Constitution of the United States confers upon the Congress plenary power to legislate for the District of Columbia, were not the courts below clearly correct in concluding that, notwithstanding the fact that the District of Columbia does not have an elected representative in either House of Congress, petitioner was properly taxed

for the calendar year 1967 under the congressionally enacted District of Columbia Income and Franchise Tax Act of 1947, as amended.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner, a resident of the District of Columbia, contends that this Court should, once again, consider the question whether the District of Columbia Income and Franchise Tax Act of 1947, as amended, which imposes personal income taxes on District residents, is unconstitutional since the Congress does not have an elected representative from the District of Columbia. This Court recently denied certiorari in a similar case. *Carliner* v. *Commissioner of the District of Columbia*, No. 631, December 15, 1969. In the *Carliner* case the issue presented was whether petitioners' claim that the Constitution confers on District of Columbia residents a right of self-government through elective officials presented an issue of sufficent substantiality to require the convening of a three-judge District Court. In concluding that petitioners' constitutional claim was wholly insubstantial, the United States Court of Appeals for the District of Columbia Circuit relied, *inter alia*, on the recent case of *Hobson* v. *Tobriner*, 255 F.Supp. 295 (D.D.C. 1966),[1] which involved the identical issue presented in *Carliner*.

In denying the application for a three-judge District Court in the Hobson case, Judge Gasch of the United States District Court for the District of Columbia stated:

> "The fact that plaintiffs' claim of unconstitutionality based upon 'taxation without representation' has been positively decided by the Supreme Court

[1] Petition for a writ of mandamus denied by the United States Court of Appeals for the District of Columbia Circuit, *sub nom. Hobson v. Gasch*, No. 20,838, September 29, 1966. Petition for writ of certiorari denied, 386 U.S. 914 (1967).

is an important factor in determining whether a three-judge court should be convened.

> "* * * It is clear that the absence of suffrage is not a bar to the power of Congress to tax the citizens of the District of Columbia, be it for local or national purposes. That portion of plaintiffs' complaint which challenges this power is deemed by the Court to be insubstantial and does not afford a basis for the convening of a three-judge court." [footnote omitted.]

The contention that the Constitution gives the taxpayers of the District of Columbia the right to an elective representative in Congress necessarily involves the contention that Congress has historically engaged in an unconstitutional usurpation of power whenever it enacted local measures in the exercise of its exclusive legislative authority over the District of Columbia. However, Article I, Section 8, Clause 17 of the Constitution, which authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia, has been construed by this Court to mean that with respect to the District Congress possesses the combined powers of both a general and a local government and that such powers are plenary and unqualified. *O'Donoghue* v. *United States*, 289 U.S. 516 (1933); *Atlantic Cleaners & Dyers* v. *United States* 286 U.S. 427 (1932). Moreover, this Court has consistently held that the constitutional power of Congress to legislate with respect to the District is as great as the power of a state legislature with respect to the state or any of its subdivisions. *Berman* v. *Parker*, 348 U.S. 26 (1954); *Atlantic Cleaners & Dyers* v. *United States, supra*, 286 U.S. at 434-435; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899); *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407-408

(1886); *Mattingly* v. *District of Columbia,* 97 U.S. 687, 690 (1878).

As early as 1820 this Court through Chief Justice Marshall stated its unanimous opinion that:

> "* * * Although, in theory, it might be more congenial to the spirit of our institutions, to admit a representative from the District, * * * *certainly, the constitution does not consider their want of a representative in congress as exempting it from equal taxation.*" *Loughborough* v. *Blake,* 18 U.S. (5 Wheat.) 317, 324 (1820). [Emphasis supplied.]

In 1838, this Court stated that "Congress has the entire control over the District, for every purpose of government * * *." *Kendall* v. *United States,* 37 U.S. (12 Peters) 524, 619 (1838). Later, in *Shoemaker* v. *United States,* 147 U.S. 282, 300 (1893), this Court noted that Congress has "full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *." Thereafter, in *Heald* v. *District of Columbia,* 259 U.S. 114, 124 (1922), this Court, speaking through Mr. Justice Brandeis, rejected the contention that a local taxing statute was void because it subjected District of Columbia residents to taxation without representation, stating that:

> "Finally, it is earnestly contended that the act is void, because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by federal taxation. The objection that the

> tax is void because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District; but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage." [footnote omitted.]

As recently as 1949, this Court in *National Insurance Company* v. *Tidewater Co.*, 337 U.S. 582, 601-602, quoted a portion of an opinion of the United States Court of Appeals for the District of Columbia Circuit on the broad authority of the Congress over the District. In the course of the opinion in *National Insurance Company* this Court said:

> "* * * the Court of Appeals for the District itself, sitting *en banc*, * * * said that Congress 'possesses full and unlimited jurisdiction to provide for the general welfare' of District citizens 'by any and every act of legislation which it may deem conducive to that end * * * when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a

> state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other.' *Neild* v. *District of Columbia,* 71 U.S.App. D.C. 306, 310, 110 F.2d 246, 250."

Clearly, the contention that petitioner cannot constitutionally be taxed by the Congress since she, as a resident of the District of Columbia, does not have an elected representative in Congress and that, to this extent, the power of Congress over the seat of government is limited, cannot be reconciled with the explicit constitutional authority of Congress over the District as upheld by an unbroken line of decisions of this Court spanning a period of more than 100 years.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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